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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WAYMAN F. THOMPSON, Plaintiff and Appellant, v. SKY SPORTS, INC., Defendant and Respondent.	B207271 (Los Angeles County Super. Ct. No. BC317320)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Affirmed.

Mancini & Associates, Marcus A. Mancini, Christopher Barnes and Timothy J. Gonzales; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Plaintiff and Appellant.

Ford & Harrison, Steven M. Kroll; Khorrami Pollard & Abir and Dylan F. Pollard for Defendant and Respondent.

Wayman F. Thompson appeals from a summary judgment in his action against his former employer, Leedom Security Service, Inc. (Leedom)[1] for racial harassment, discrimination, and retaliation. Regarding Thompson's racial discrimination and retaliation claims, the trial court found that Leedom established that it had legitimate, nondiscriminatory reasons for terminating Thompson and that Thompson had failed to create a triable issue whether Leedom's reasons were pretextual. The trial court also found that Thompson's evidence in support of his racial harassment claim failed to create a triable issue of material fact. Accordingly, the trial court granted Leedom summary judgment. We affirm.

BACKGROUND

Leedom is a California corporation which provides unarmed, uniformed, private security guard services throughout California. Leedom's president and chief executive officer, Keith Leedom, personally interviewed Thompson and on September 25, 2002, hired and assigned Thompson to work at the Oceanaire condominium complex in Santa Monica (Oceanaire), one of Leedom's customers. In November 2002, Leedom promoted Thompson to post commander at the Oceanaire property and increased his salary by 50 percent. Thompson is African American. Most of the security guards at Oceanaire were African American.

Shortly after his November 2002 promotion to supervisor, Thompson called Leedom and told him that Oceanaire's property manager had asked him why Leedom did not hire Hispanic security guards. During their conversation, he repeated some of the property manager's comments, although the record is not clear as to what specific comments he related to Leedom.[2] Leedom suggested that Thompson discuss the matter

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[1] We use "Leedom" to refer to Leedom Security Service, Inc., its successor, Sky Sports, Inc., doing business as Sky Security Services, and its principal, Keith Leedom.

[2] Thompson recalled the property manager asking questions such as, "[w]hat is the problem with your company? Why you don't hire people -- my kind of people?" or, "Wayman, do you think you can

with Oceanaire's president, which Thompson did. Nothing in the record shows that after Thompson complained to Oceanaire's president that the property manager continued to talk to Thompson about hiring Hispanic security guards. The record also does not reveal that Thompson complained to Leedom that the conduct continued.

A few months later Thompson called Leedom again and complained that Oceanaire's property manager did not relieve him from his duties at the front desk often enough for bathroom breaks. Thompson told Leedom that he was tired of the property manager's discriminatory treatment of him and requested a transfer. Leedom told Thompson to "deal with it." The record is silent as to whether Thompson brought this complaint to the attention of Oceanaire. Nor does the record reveal if this conduct continued. The record likewise does not reveal that Thompson complained to Leedom that this conduct continued.[3]

In mid to late May 2003, Thompson complained to Leedom that he believed that Oceanaire's maintenance man had made a comment referring to him, using the term "chongo."[4] In his deposition Thompson described the incident. He was at his post in the lobby and within earshot of a conversation between the maintenance man and two maids. They spoke to each other in Spanish and Thompson heard the maintenance man say "chongo." Thompson does not speak Spanish but he understood the word to be a

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call Leedom and ask them if they can get a Spanish person working one of the shifts?" or, "[w]hy do you have African Americans working here and my people need jobs?"

3 Thompson believed that Oceanaire's maintenance man harassed him because of his race by referring to him by the term "negro" when speaking Spanish to other Spanish-speaking persons. In his deposition, Thompson recalled two times when the maintenance man used the term "negro": once in a conversation with a Spanish-speaking electrician and once with a Spanish-speaking maid. Thompson believed that the term was a reference to him and was offended because he believed the term could also mean "nigger" in English. He did not, however, report these incidents to Leedom.

4 According to Thompson's deposition, the maintenance man used the term "chongo" in Spanish conversations three additional times that week while in his presence, although not speaking to him: once while the maintenance man was speaking to a maid by the elevators, once while speaking on the telephone, and once while speaking to a maid in the lobby. Each of the maintenance man's conversations was in Spanish and Thompson did not know the context of the conversations or what was being said. He, however, believed the term "chongo" referred to him and was meant to be derogatory. Thompson did not report the additional incidents to Leedom.

derogatory term for African Americans, meaning "monkey" or "gorilla." Leedom asked Thompson to document his complaint and to send it to him. According to Leedom, and not controverted by Thompson, Thompson responded, "'[d]on't worry about [it]. It's not that big of a deal. I don't want you to do anything.'" Sometime in June 2003, but apparently before June 13th, Leedom nevertheless arranged a meeting with Thompson, an Oceanaire board member, Oceanaire's property manager, and Oceanaire's maintenance man to discuss Thompson's complaint. Leedom wanted to get the parties together to better assess their credibility when they explained their version of the various events. After the meeting, Leedom could not determine who was telling the truth. But concerned whether Thompson had fully expressed his views at the meeting, Leedom had a follow-up conversation with Thompson to solicit any further comments he wished to add privately. After their discussions, Leedom asked Thompson whether he still felt comfortable working at Oceanaire. According to Leedom, Thompson responded, "'I feel fine. We can all work together. Let's move forward.'"

Sometime in mid to late May 2003, Thompson also met with Oceanaire's president and complained that the maintenance man had referred to him by the term "chongo." The president told Thompson that he took his complaint very seriously and that he would conduct an investigation. The president notified the board of directors and directed Oceanaire's counsel to interview the parties and witnesses and to report back to the board. On June 12, 2003, Oceanaire's counsel interviewed Thompson, the property manager, the maintenance man, and some of the maids who had witnessed the conversations. The maintenance man denied using the term "chongo." Counsel did not find that the complaint was substantiated, but as a possible resolution to the situation, asked Thompson if he would be satisfied with an apology from the maintenance man and that the maintenance man be "written up." Thompson was adamant that he had heard the man say "chongo," but said that he would consider accepting the offered apology to resolve the matter.

On the next day, June 13, 2003, Oceanaire's property manager informed Leedom that Oceanaire's May 2003 telephone bill had an unauthorized charge for the purchase of an internet service in April 2003. The property manager faxed Leedom a copy of the telephone bill reflecting the charge, as well as other charges for lengthy personal calls apparently occurring on Thompson's shift. The property manager cancelled the internet service and requested a tape recording of the call authorizing the charge. Leedom listened to the tape recording from the internet company and recognized Thompson's voice. In response to computerized questions in the automated call, Thompson claimed to be Oceanaire's property manager and stated that he was authorized to incur charges to Oceanaire's telephone account, and purchased the internet services. Leedom called Thompson and asked whether he had talked to a solicitor for internet services while on duty at Oceanaire and Thompson said he had. Thompson, however, denied that he had ordered any services. Leedom also asked Thompson whether he had made personal calls on Oceanaire's telephone despite Leedom's policy prohibiting such calls, and Thompson admitted that he had. After hearing the tape recording and hearing Thompson's explanations, Leedom decided Thompson's acts had been "deceitful" and "immoral" and decided to terminate him. Leedom reimbursed Oceanaire for Thompson's unauthorized charges at its request.

At his deposition, Thompson testified that he had also listened to the tape recording and acknowledged that it was his voice and that the recording of his voice impersonating Oceanaire's property manager was convincing and believable. At his deposition, Thompson claimed that the internet company must have edited or altered the tape, because he claimed that he had talked to a live person who had simply asked for the property manager's name, telephone number, and address. Thompson did not, however, testify that he had told Leedom that he believed the tape was edited or altered.

On June 20, 2003, Thompson came into Leedom's offices and signed a discipline report listing three reasons for his termination: (1) making an unauthorized purchase of internet services that were charged to Oceanaire by Thompson impersonating its property

manager; (2) failing to get his picture taken to replace his company identification card despite directions to do so; and (3) making lengthy, unauthorized personal calls using Oceanaire's telephone and incurring charges for those calls to its account. In his deposition Thompson acknowledged that he had signed the discipline report. He also acknowledged that he had been given copies of Oceanaire's telephone bill showing his personal telephone calls charged to its account and showing the purchase of internet services. Thompson, however, testified that the discipline report he signed only mentioned personal phone calls and the identification card but said nothing about an unauthorized purchase of internet services. When shown a copy of Leedom's discipline report listing all three reasons, Thompson claimed that the signature on the form was not his.

Thompson recalled that four African American security guards who had worked at Oceanaire had also complained that the property manager had harassed them because of their race. According to Thompson, when, as their supervisor, he relayed these guards' complaints, Leedom terminated them rather than investigate because, according to Thompson, Leedom considered its contract with Oceanaire more valuable.

On June 25, 2004, Thompson filed his first amended and operative complaint alleging causes of action against Leedom for racial harassment, discrimination, retaliation, and wrongful termination in violation of public policy in violation of the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12940 et seq.)[5] Leedom moved for summary judgment, and Thompson filed opposition, to which Leedom replied. The trial court granted Leedom summary judgment. Thompson timely appealed from the judgment.

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5 Named defendants in Thompson's first amended complaint included Oceanaire, its president, and the maintenance man. In September 2005, the trial court granted these defendants summary judgment and we affirmed in an unpublished opinion. (*Thompson v. Oceanaire Homeowners Assoc*. (July 3, 2007, B186673).)

DISCUSSION

Thompson contends that his evidence was sufficient to create disputed issues of material fact with respect to his causes of action for wrongful termination, racial harassment, discrimination, and retaliation and thus the trial court erred in granting Leedom summary judgment. We disagree.

This action is against Thompson's employer based on racially discriminatory and harassing conduct by employees of Leedom's customer. Thus, evidence of the nature of Thompson's complaints to Leedom and the evidence of Leedom's response to those complaints is critical in determining whether disputed issues of material fact remain to be tried and thus whether summary judgment was properly granted.

Standard of Review

Because Thompson appeals from the summary judgment entered against him, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142.)

Race Discrimination

Government Code section 12940, subdivision (a) makes it an unlawful employment practice to "discriminate against [a] person in compensation or in terms, conditions, or privileges of employment."

Because this case does not involve direct evidence of discrimination by the decision maker Leedom,[6] the burden-shifting analysis of *McDonnell Douglas Corp. v.*

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6 The trial court correctly found that this case did not involve evidence of direct discrimination by Leedom. Thompson testified in his deposition that no one employed by Leedom had ever made any racially derogatory remarks toward him, had ever exhibited any discriminatory conduct toward him, or had ever discriminated against him in any way.

Thompson contends, however, that the evidence Leedom told him "to deal with it" when he complained about Oceanaire's property manager, Leedom's failure to properly investigate his complaints, and Leedom's failure to discipline the harassers or prevent the harassment, constituted direct evidence of discrimination sufficient to create a triable issue regarding Leedom's motive. Again, we agree with the trial court that this evidence (discussed post) is not direct evidence of discrimination.

Green (1973) 411 U.S. 792, 802-805 is appropriate. Under this test "the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations, fn. omitted.] [¶] If . . . the plaintiff establishes a prima facie case, a presumption of discrimination arises. . . . [¶] Accordingly, at this . . . stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [Citations.] [¶] If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.] In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. [Citations.] The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff. [Citations.]" (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 355-356.)

We will assume for purposes of discussion that Thompson's evidence satisfied the elements of a prima facie case that his firing was racially motivated. The burden thus shifted to Leedom to rebut the inference of discrimination by showing that its action was taken for a legitimate, nondiscriminatory reason. Leedom satisfied this burden. The evidence showed that Leedom terminated Thompson based on his (1) misconduct in impersonating Oceanaire's property manager and incurring unauthorized charges for internet services; (2) insubordination by failing, despite requests, to have his photo taken in order to replace his identification card; and (3) violation of company policy by making unauthorized telephone calls for which Oceanaire was charged. Although Thompson testified that the internet company must have edited or altered the tape to make it sound

as though he made the unauthorized purchase, he did not testify that he shared this claim with Leedom. In any case, after listening to the tape and recognizing Thompson's voice, Leedom's genuine belief that Thompson had purchased the internet service by impersonating Oceanaire's property manager sufficed to meet the employer's burden. (*Guz v. Bechtel Nat. Inc*., *supra*, 24 Cal.4th at p. 358 [proffered reasons, if "nondiscriminatory on their face" and "honestly believed" by employer, will suffice even if "foolish or trivial or baseless"].)

Thompson contends, however, that Leedom's proffered justifications for his termination were pretexts for racial discrimination. He cites six reasons why Leedom's justifications were pretextual and claims that, at minimum, each created triable issues of fact sufficient to preclude summary judgment. We disagree.

"'Pretext may be demonstrated by showing ". . . that the proffered reason had no basis in fact, the proffered reason did not actually motivate the discharge, or, the proffered reason was insufficient to motivate [the] discharge. [Citation.]" [Citation.]'" (*Villanueva v. City Of Colton* (2008) 160 Cal.App.4th 1188, 1195, quoting *Hanson v. Lucky Stores, Inc.*, 74 Cal.App.4th 215, 224, fn. omitted.) "'An employee in this situation cannot "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee '"must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' [Citations.]" [Citations.]' [Citation.]" [Citation.]' (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 75.)" (*Villanueva v. City Of Colton*, *supra*, (2008) 160 Cal.App.4th at p. 1195.)

In an effort to show that Leedom's reasons were pretextual, Thompson claims that the temporal proximity between his May 2003 protected activity—his complaint of racial discrimination in the workplace—and his June 2003 termination created an inference of pretext. Proximity alone, however, is insufficient when, as here, there is strong evidence

of the employer's reasonable and genuine belief of the employee's serious misconduct. The evidence showed that Leedom learned on June 13, 2003, that Thompson had impersonated Oceanaire's property manager and had made an unauthorized purchase on Oceanaire's account. Once Leedom confirmed that it was Thompson's voice on the tape recording and confirmed with Thompson that Thompson had had a discussion with the internet company, Leedom decided to terminate Thompson's employment. That Leedom first learned of Thompson's unethical conduct shortly after Thompson's complaint is insufficient to raise an inference that his complaint prompted his discharge. (See, e.g., *King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 436 ["a disabled employee has no greater prerogative to compromise his integrity than any other employee. The mere fact that UPS found plaintiff had breached its integrity policy shortly after returning to work is insufficient to raise an inference that his blood disorder prompted his discharge"]; *Arteaga v. Brink's, Inc*. (2008) 163 Cal.App.4th 327, 353 ["temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination"].)

Next, Thompson claims the evidence that he was promoted, given a 50 percent raise, and had received no complaints about his job performance constituted circumstantial evidence that his termination was pretextual. We disagree. The first complaint Leedom received about Thompson's job performance concerned a serious breach sufficient to justify his termination—his unauthorized purchase of internet services on Oceanaire's account by impersonating its property manager. Leedom listened to the tape recording, recognized Thompson's voice ordering the service, and concluded that Thompson's act was "deceitful," "immoral," and warranted termination.

The third ground Thompson cites as showing pretext is his claim that someone falsified his discipline report to add the charge of ordering internet services and then signed his name to the altered report. In his deposition, Thompson testified that on termination he signed the discipline report and was given copies of Oceanaire's phone

records to substantiate the charges against him which showed both the telephone and internet charges. Thompson also acknowledged that he was notified that he was being fired because of the unauthorized charges he had incurred on Oceanaire's account. Whether the particular item was actually listed on the report he signed or not is irrelevant.

Thompson's fourth circumstance that he claims shows pretext is that Leedom told him that his termination was based in part on his violation of Leedom's policy prohibiting security guards from using Oceanaire's telephone to make personal calls. Thompson claims this reason was pretextual because all Leedom's guards used Oceanaire's phone and because he claims Leedom told him that personal use of Oceanaire's telephone was not a problem. This is insufficient to create a triable issue whether Leedom's reasons were a pretext for racial discrimination where Thompson does not dispute that Leedom had such a telephone policy, acknowledged that his personal use of Oceanaire's telephone violated the policy by signing the discipline report, and where unauthorized use of Oceanaire's telephone which incurred charges on its account was only one of the several legitimate grounds cited for his termination.

The fifth circumstance that Thompson claims shows that Leedom's reasons were pretextual was related to Thompson's failure to have his photograph taken in order to replace his lost identification card. Thompson does not deny that he lost his identification card or that he failed to have his photo taken and replace the card, or that it was Leedom's policy to require security guards to wear their identification cards at all times while on duty. He instead claims that Leedom testified that his failure to replace his identification card was a "minor issue." Leedom actually testified that "compared to the issue at hand" it was a "minor issue" that Thompson was not wearing his identification badge *when they met to discuss his complaint of racial discrimination* against him by Oceanaire's employees. Leedom explained that during the meeting Thompson was off duty and not then sitting at Oceanaire's front desk where an identification card was required.

Finally, Thompson contends proof that Leedom's reasons for terminating him were pretextual was Thompson's testimony that four African American security guards were terminated after they complained that Oceanaire's property manager had harassed them because of their race. According to Thompson, when as their supervisor he relayed these guards' complaints, Leedom terminated them rather than investigate because, according to Thompson, Leedom considered its contract with Oceanaire more valuable. None of these guards submitted an affidavit or declaration. Thus, Thompson's asserted reason for these guards' termination is based on speculation rather than actual evidence. Thompson's subjective belief regarding the reason these guards were terminated, however, was insufficient to create a triable issue whether the reasons given for his own termination were a mere pretext for racial discrimination. (*King v. United Parcel Service, Inc.*, *supra*, 152 Cal.App.4th at p. 433 ["plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations"].)

Further, the circumstantial evidence in this case militates against any inference of racially discriminatory motive. If Leedom were biased against Thompson because of his race, then presumably he would not have hired him in the first place, and would not have promoted him within a few months to post commander at increased pay. Under the so-called "one actor rule," "'where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive.' [Citations.] . . . '"One is quickly drawn to the realization that "[c]laims that employer animus exists in termination but not in hiring seem irrational." From the standpoint of the putative discriminator, "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."' [Citation.]" (*Horn v. Cushman & Wakefield Western, Inc*. (1999) 72 Cal.App.4th 798, 809, fn. omitted; see also, *West v. Bechtel Corp*. (2002) 96 Cal.App.4th 966, 981

[presumption applied with "particular force" where the hiring person fired the plaintiff scarcely more than a month after hiring him].)

The "one actor" presumption applies here. Leedom personally hired Thompson, personally promoted him to post commander, and personally fired him all within a nine-month period. (*Horn v. Cushman & Wakefield Western, Inc*., *supra*, 72 Cal.App.4th at p. 809, fn. 7 [presumption applied although more than five years had elapsed].) Leedom presumably would not have hired Thompson, given him a promotion with increased pay, or posted so many African American guards at the Oceanaire property, if he held animus against African Americans. The evidence shows that Leedom only decided to terminate Thompson's employment after verifying Oceanaire's claim that Thompson had committed a serious breach of trust.

Thompson contends the "one actor" presumption only applies to trials, but existing law is to the contrary. (See e.g., *Horn v. Cushman & Wakefield Western, Inc*., *supra*, 72 Cal.App.4th at pp. 801-802 [analyzing the "one actor" rule in the context of a summary judgment].) Thompson also contends that the presumption is inapplicable where a third party was a partial cause of his firing—Oceanaire's president's insistence that he be removed from the Oceanaire post. Again, the law is to the contrary. (*West v. Bechtel Corp*., *supra*, 96 Cal.App.4th at pp. 980-981 ["one actor" presumption applied although the Saudi Arabian Royal Commission was biased against the plaintiff because of his age and directed that he be fired].)

Finally, Thompson asserts that he rebutted the "one actor" presumption by both direct and circumstantial evidence of discriminatory motive. We disagree. As already noted, Thompson presented no direct evidence of any discriminatory motive or racial animus by Leedom, and we have concluded that Thompson's circumstantial evidence was insufficient to raise a triable issue whether Leedom's legitimate, nondiscriminatory reasons were pretextual.

Retaliation

FEHA prohibits discrimination or adverse employment actions against an employee for engaging in protected activities. (Gov. Code, § 12940, subd. (h).)

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation '"'drops out of the picture,'"' and the burden shifts back to the employee to prove intentional retaliation. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1042.)

We will again assume for purposes of discussion that Thompson's evidence established a prima facie case of retaliation. We have already, however, concluded that Leedom produced legitimate, nonretaliatory reasons for its adverse employment action. Thus, any presumption of retaliation '"""drop[ped] out of the picture'""" and the burden shifted back to Thompson to prove intentional retaliation.

Thompson contends summary judgment was improperly granted because he presented substantial evidence of pretext sufficient to prove intentional retaliation. We disagree. As noted in the previous section, Thompson's evidence of pretext failed to raise a triable issue whether Leedom's reasons for his termination were unworthy of credence. (*Morgan v. Regents of University of Cal*. (2000) 88 Cal.App.4th 52, 69 ["[c]ircumstantial evidence of '"pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis"].)

Harassment

The FEHA prohibits racial harassment in the workplace. Government Code section 12940, subdivision (j)(1), states that it is unlawful "[f]or an employer . . . or any

other person, because of race . . . to harass an employee . . . . Harassment of an employee . . . by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." California Code of Regulations, title 2, section 7287.6, subdivision (b)(1)(A), defines harassment to include "[v]erbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act[.]"

In 2003 the Legislature amended subdivision (j)(1) to provide that an employer may also be liable for harassment of its employees by nonemployees. The amended language provides that "[a]n employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered."

Although the amendment imposing liability on employers for the conduct of nonemployees includes only sexual harassment, the parties do not question that liability can be imposed for racial harassment as well. (*Carter v. California Dept. of Veteran Affairs* (2006) 38 Cal.4th 914 [amendment clarified existing law and thus applied retroactively to the plaintiff's sexual harassment action].) We will therefore assume for purposes of this decision that liability can be based on any harassment prohibited by the FEHA.

With respect to racial harassment, "not every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within

the meaning of Title VII. [Citations.] For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." [Citation.]' [Citation.] . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' Recently, the high court observed that it had 'made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment . . . .' [Citation.] [¶] California courts have adopted the same standard in evaluating claims under the FEHA. . . . [T]he harassment complained of must be 'sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment . . . .' [Citation.] 'The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [he] was actually offended.' [Citation.] '[H]arassment cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.]' [Citation.]" (*Aguilar v. Avis Rent A Car System, Inc*. (1999) 21 Cal.4th 121, 130-131.)

We will assume for purposes of discussion the complaints that Thompson reported to Leedom, viewed as a whole, constituted racial harassment; that the complained-of conduct was sufficiently severe and pervasive to create an objectively hostile work environment; and that Thompson subjectively believed the conduct created a hostile work environment.

We conclude, however, that the evidence showing that Leedom took immediate and appropriate corrective action to end the harassment provided a complete defense to the harassment cause of action. Determining whether corrective action is sufficient

"'depends on its ability to: (1) "stop harassment by the person who engaged in harassment;" and (2) "persuade potential harassers to refrain from unlawful conduct."' [Citation.] Although an 'investigation is a key step,' [citation], we 'consider the overall picture' to determine whether the employer's response was appropriate. [Citation.]" (*Hardage v. CBS Broadcasting, Inc*. (9th Cir. 2005) 427 F.3d 1177, 1186.)

Thompson initially complained that the property manager asked him why Leedom did not hire more Hispanic guards. Leedom immediately directed Thompson to discuss the matter with Oceanaire's president which Thompson did. Thompson does not claim that this conduct continued. Thompson later complained to Leedom that the property manager did not permit him to take sufficient bathroom breaks. Because Thompson felt the property manager's acts were discriminatory, he requested a transfer. Leedom told Thompson to "deal with it."

Leedom heard no further complaints about the property manager. In mid to late May 2003, however, Thompson informed him that Oceanaire's maintenance man had referred to him using the racially derogatory term "chongo." Leedom asked Thompson to document the incident. Although Thompson declined, and reportedly told Leedom "'[d]on't worry about [it]. It's not that big of a deal. I don't want you to do anything.'" Leedom, nevertheless, promptly proceeded to investigate Thompson's complaint. (His investigation was in addition to the parallel investigation conducted by Oceanaire's counsel.) Leedom organized a meeting with Oceanaire personnel, Thompson, and his harassers to address Thompson's charges. At the conclusion of the meeting, Leedom could not determine who was telling the truth. Leedom again talked with Thompson and provided him an opportunity to discuss the situation privately and more fully if he wished. Thompson told Leedom that he wanted to continue working at Oceanaire. According to Leedom, when he asked Thompson whether he still felt comfortable working at Oceanaire Thompson responded, "'I feel fine. We can all work together. Let's move forward.'"

An employer must be given a reasonable amount of discretion in selecting the appropriate response depending on all the circumstances. Here Leedom took appropriate action considering that the initial two complaints were not about conduct discriminatory on its face, that Thompson, as a supervisor, might be expected to resolve these personnel issues, at least initially, directly with Oceanaire, and that Leedom had no direct control over Oceanaire employees. (See Gov. Code, § 12940, subd. (j)(1) ["[i]n reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered"].) When, however, Thompson later complained that he believed Oceanaire's maintenance man had referred to him using the term "chongo," and what appeared to Thompson to be a blatantly racist remark, Leedom took more aggressive action and himself immediately conducted an investigation into the complaint, despite Thompson's stated desire that Leedom take no action.

Wrongful Termination in Violation of Public Policy

Thompson's cause of action for wrongful termination in violation of public policy was derivative of his causes of action under the FEHA. This claim thus fails for the same reasons his discrimination, retaliation and harassment claims fail.

Here Leedom's showing of legitimate, nondiscriminatory reasons was made by competent and admissible evidence. (Code Civ. Proc., § 437c, subd. (d).) Moreover, the reasons advanced were legally sufficient to establish that Thompson's FEHA causes of action had no merit (Code Civ. Proc., § 437c, subd. (o)(2)), because the reasons were unrelated to racial discrimination against Thompson. Because Thompson failed to raise disputed issues of fact whether the decision to terminate his employment was actually based on the prohibited basis of race, Leedom was entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Accordingly, the trial court did not err in granting Leedom summary judgment.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.